



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION

JOHN G. WESTINE,
Petitioner,

v.

JOSEPH NORWOOD, Warden,
et al,
Respondents.

Case No. CV 06-6326-SVW (JWJ)

MEMORANDUM AND ORDER

I. SUMMARY OF PROCEEDINGS

On August 8, 2007, petitioner John G. Westine, Jr., a federal prisoner proceeding pro se, filed a "Second Amended Petition for Writ of Habeas Corpus by a Person in Federal Custody (28 U.S.C. § 2241)" (hereinafter "Second Amended Petition" or "SAP").¹ On October 19, 2007, this Court construed petitioner's Second Amended Petition as a motion pursuant to 28 U.S.C. § 2255, and transferred the action to the United States District Court

¹ Petitioner initially filed a Petition for Writ of Habeas Corpus Pursuant to § 2241 on October 4, 2006. On November 16, 2006, this Court dismissed the petition with leave to amend because the petition was not on the proper form and failed to provide all necessary information. (11/16/06 Order, p. 2.) On July 30, 2007, petitioner filed a First Amended Petition for Writ of Habeas Corpus.

1 for the Southern District of Ohio. (10/19/07 Order, p. 6.) On November 26,
 2 2007, petitioner submitted two documents titled "Petitioner's Request for a
 3 Court Order Said Transfer is Pursuant to Fedael [sic] Rule Civil Procedure
 4 15(c)(2) 'Relation Back Theory'" and "Federal Rule Civil Procedure
 5 60(b)(4)(6) to Vacate Void Transfer Order." This Court will construe
 6 petitioner's submission of both documents as a Motion for Reconsideration of
 7 the Court's decision to transfer the case. Petitioner contends that this Court
 8 should void the Transfer Order and reinstate the Petition in this Court as a
 9 properly filed Writ of Habeas Corpus Section 2255 "Escape Hatch"² based on
 10 the following: petitioner's "claims of 'actual and factual innocence' are barred
 11 from certification under § 2244, to allow a second or successive petition."
 12 (Motion for Reconsideration, p. 1.)³

14 II. DISCUSSION

15 Petitioner contends that the transfer order issued by this Court on
 16 October 19, 2006 is void because he is barred from filing a second or successive
 17 petition § 2255 motion in the Court where the petition was transferred.

19 ² The "escape hatch" referred to by petitioner permits a federal prisoner to "file a
 20 habeas petition pursuant to § 2241 to contest the legality of a sentence where his
 21 remedy under § 2255 is 'inadequate or ineffective to test the legality of his
 22 detention.'" Stephens v. Herrera, 464 F.3d 895 (9th Cir. 2006). It does not allow
 23 the Court to consider a § 2255 motion without authorization from the Court of
 24 Appeals. Thus, this Court will construe petitioner's request as a motion to reinstate
 the §2241 Petition under the savings clause rather than to transfer back the petition
 as a §2255 motion.

25 ³ This Court will refer to petitioner's second document, titled "Fedael [sic] Rule
 26 Civil Procedure 60(b)(4)(6) to Vacate Void Transfer Order," as the Motion for
 27 Reconsideration. Petitioner's first document, titled "Petitioner's Request for a Court
 28 Order Said Transfer is Pursuant to Federal Rule Civil Procedure 15(c)(2) 'Relation
 Back Theory'" only requests a transfer without providing any further substantive
 information.

1 (Motion for Reconsideration, p. 1.)

2 Federal Rule of Civil Procedure 60(b)(4) provides that “[o]n motion and
3 upon such terms as are just, the court may relieve a party . . . from a final
4 judgment, order, or proceeding . . . [if] . . . the judgment is void.” Here,
5 petitioner claims that the order construing his petition as a § 2255 motion and
6 transferring the action to the sentencing court is void because his petition will
7 constitute a second or successive § 2255 motion. However, the Court’s
8 decision to construe petitioner’s § 2241 petition as a § 2255 motion, and to
9 transfer the case to the sentencing court was not only within the Court’s
10 discretion, but also required by law.

11 Generally, motions to contest the legality of a sentence must be filed
12 under § 2255 in the sentencing court, while petitions that challenge the
13 manner, location or conditions of a sentence’s execution must be brought
14 pursuant to § 2241 in the custodial court. See Doganiere v. United States, 914
15 F.2d 165, 169-70 (9th Cir. 1990); Brown v. United States, 610 F.2d 672, 677
16 (9th Cir. 1990). Here, petitioner challenged his sentence on various grounds.
17 Specifically, petitioner presented the following claims in his petition: (1)
18 petitioner was charged with a non-existent crime (money laundering); (2)
19 petitioner was denied the statutory right to a direct appeal of his illegal
20 sentence; (3) petitioner was denied retained counsel of choice because his
21 funds were frozen; and (4) petitioner was denied due process afforded to other
22 petitioners by the Sixth Circuit. (Second Amended Petition, pp. 3, 3a.)⁴

23 Under the savings clause of § 2255, a federal prisoner may file a habeas
24 corpus petition pursuant to § 2241 to contest the legality of a sentence where
25 his remedy under § 2255 is “inadequate or ineffective to test the legality of his
26

27 ⁴ Petitioner included an additional page between pages 3 and 4 of the Petition. For
28 clarity, this Court will refer to the additional page as “3a.”

1 detention.” 28 U.S.C. § 2255; see Moore v. Reno, 185 F.3d 1054, 1055 (9th
2 Cir. 1999). An inquiry into whether a § 2241 petition is proper under these
3 circumstances is critical to the determination of district court jurisdiction
4 because the proper district for filing a habeas petition depends upon whether
5 the petition is filed pursuant to § 2241 or § 2255. Hernandez v. Campbell,
6 204 F.3d 861,865 (9th Cir. 2000). Where a petitioner claims that § 2255
7 provides an ineffective remedy, the district court in which the petition is
8 brought is required initially to rule whether a § 2241 remedy is available under
9 the savings clause. Id. at 866.

10 Here, the Court correctly found that petitioner is challenging the validity
11 of his sentence. Thus, petitioner’s claims must be addressed in a motion under
12 § 2255 unless he can show that the remedy under § 2255 is “inadequate or
13 ineffective” and therefore, the savings clause would apply in his case. Although
14 the Ninth Circuit has not fully defined when the remedy under § 2255 is
15 “inadequate or ineffective,” the exception is very narrow. See Ivy v. Pontesso,
16 328 F.3d 1057, 1059 (9th Cir. 2003).

17 The Court also found that petitioner failed to show that his remedy
18 under § 2255 is “inadequate or ineffective.” Indeed, in both the Second
19 Amended Petition and his Motion for Reconsideration, petitioner argues that
20 his remedy is inadequate because all his other “attempts” have been converted
21 into a second or successive § 2255 motion (SAP, p. 4), and that his claims are
22 “barred” as a second or successive petition. (Motion for Reconsideration, p. 1.)
23 As discussed in the transfer order, **AEDPA’s filing limitations on § 2255**
24 **motions do not render § 2255 inadequate or ineffective.** See Moore, 185
25 F.3d at 1055; Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000).

26 Accordingly, the Court finds that the transfer order issued by this Court
27 on October 19, 2007 is valid, and thus, petitioner’s Motion for
28 Reconsideration must be denied.

ORDER

For all the foregoing reasons,

IT IS HEREBY ORDERED AS FOLLOWS:

Petitioner's "Request for a Court Order Said Transfer is Pursuant to Federal [sic] Rule Civil Procedure 15(c)(2) 'Relation Back Theory'" and "Federal Rule Civil Procedure 60(b)(4)(6) to Vacate Void Transfer Order" are **DENIED.**

DATED: 8/13/08


STEPHEN V. WILSON
United States District Judge

Presented by:

DATED: February 12, 2008


JEFFREY W. JOHNSON
United States Magistrate Judge